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ABSTRACT

This report transmits the fruits of an inquiry into the constitutional constraints on the question of whether it is possible in Massachusetts to design programs to assist private higher education with public funds. The original focus of the inquiry was on the Massachusetts Constitution, especially its unique Amendment 46. Amendment 46 suggests public "order and superintendence" of institutions receiving state aid. It bars aid for denominational schools even if under public control and for all institutions that are not both publicly "owned" and under the exclusive control of public officers. Also, the Amendment bars aid to schools "wherein any denominational doctrine is inculcated." Thestudy showed, however, that Amendment 46 is, for a provision of law, relatively clear and relatively well understood. It is also one-third of the way to being amended in a way that would virtually affect the subjects under view. The study also showed that the First Amendment to the United States Constitution is likely to play a more important role in determining the permissibility of future Massachusetts programs than the amended Article 46. Therefore, the second part of this report is directed toward the First Amendment issues. (Author)

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THE STATE AND FEDERAL CONSTITUTIONS AND THEIR EFFECT IN MASSACHUSETTS ON THE QUESTION OF STATE AID TO PRIVATE HIGHER EDUCATION

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THE STATE AND FEDERAL CONSTITUTIONS AND THEIR EFFECT IN MASSACHUSETTS ON THE QUESTION OF STATE AID TO PRIVATE HIGHER EDUCATION

By Lance Liebman*

I. Introduction

This report transmits the fruits of an inquiry into the constitutional constraints on the question of whether it is possible in Massachusetts to design programs to assist private higher education with public funds.

The original focus of the inquiry was on the Massachusetts Constitution, especially its unique Amendment 46. Study showed, however, that Amendment 46 is, for a provision of law, relatively clear and relatively well understood. It is also one-third of the way to being amended in a way that would vitally affect the subjects under review.

Study also showed that the First Amendment to the United States Constitution is likely to play a more important role in determining the permissibility of future Massachusetts programs than the amended Article 46. Therefore, the second part of this report is directed toward federal issues.

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*The opinions, conclusions and recommendations in this report are those of the author, and do not necessarily represent the policy of the Academy for Educational Development.

II: The Massachusetts Constitution

Prior to the First World War, the Massachusetts Constitution contained no unusual restrictions on public relations with private charitable Foundations. 1/ Indeed, the Constitution itself placed the President and Fellows of Harvard College in a specially-favored position; 2/. and, more generally, the strong and only quasi-private institutions of education, health, and welfare were continually the subject of public assistance as well as of public regulation. 3/

The 1917-1918 Constitutional Convention changed all that. After debates that showed unmistakeable traces of ethnic conflict, 4/ the Convention proposed by overwhelming vote a bar on public assistance to private education more stringent than anything extant in the

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1/ The principal provision was Amendment 18, adopted in 1855, which said:

> All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of public schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such money shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school.

2/ Massachusetts Constitution §§ 88-90.

3/ See, e.g., Merrick v. Amherst, 94 Mass. (12 Allen) 500 (1866).

4/ See 1 Debates of Massachusetts Constitutional Convention of 1917-1918 at 44, 50, 59-70, 72-119, 135-227, 234-279, 360-362.

nation at that time. The voters approved Amendment 46, and from 1918 it has been part of the fundamental law of the Commonwealth that:

> [A] All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the Commonwealth for the support of common schools shall be applied to, and expended in no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and [B] no grant appropriation or use of public money or property or loan of public credit shall be made or authorized by the Commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the Commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.
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> (Note: /A/ and /B/ added; emphasis added)

Amendment 46 is remarkably free of loopholes. Part A alone, which was in substance the whole of the provision before 1918 (it was then Amendment 18), would not be so restrictive. It suggests

public "order and superintendence" of institutions receiving aid, and perhaps private recipients could be placed under terms that would be held to achieve that status. But Part B, added in 1918, is tougher. It extends the earlier provision, which only covered lower schools, to higher education. It bars loans as well as grants, and the use of public property or credit as well as of money. Most important, it closes the loophole of Part A, barring aid for denominational schools even if under public control, and for all institutions which are not both publicly "owned" (whatever that means) and under the "exclusive" control of public officers. Also, the Amendment bars aid to schools "wherein any denominational doctrine is inculcated," seemingly predicting (and preventing for Massachusetts) the recent attempts to see religious institutions as places where both sectarian and secular learning goes on, so as to permit application of public funds to the secular programs.

Even if Amendment 46 were not so clear on its face, a half-century of interpretation by the Supreme Judicial Court and successive Attorneys General has slapped down every attempt to amend the language by legal interpretation or by accreted practice. For example, in two recent advisory opinions, the Supreme Judicial Court has interpreted the amendment, and each time its message to the General Court has been clear and negative. In Opinion of the

Justices of May 11, 1970, 5/ the Court advised against the compatibility with Amendment 46 of "an act providing for the purchase by the Commonwealth of ecular educational services from nonpublic schools." Said the Court: 6/

> The language unquestionably was designed to preclude entirely aid to all nonpublic institutions from appropriated public funds with minor exceptions not here relevant.

Then, in Opinion of the Justices of June 4, 1970, 7/ the Court said no to a "two-year emergency program of state financial assistance for all elementary and secondary school children in the Commonwealth." The plan would have given each pupil, whether attending a public or private school, a $100 "voucher" to carry to his school. The court called this: 8/

> an indirect form of aid to nonpublic schools which, if enacted, would have the same practical effect as the measure which we recently considered.

It remains worth asking, what could be done consistent with Amendment 46?

1. Might the Court distinguish higher education, especially in the light of the United States Supreme Court's willingness to do so in Tilton v. Richardson, discussed extensively infra? The

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5/ 357 Mass. 836, 258 N.E. 2d 779 (1970).

6/ 357 Mass. at 844, 258 N.E. 2d at 784.

7/ 357 Mass. 846, 259 N.E. 2d 564 (1970).

8/ 357 Mass. at 850, 259 N.E. 2d at 566.

language of the Amendment does not appear to permit such a distinction. The Massachusetts Court has shown no willingness to do so in the past. And this is not a Court which, at least since Holmes, could be classed at even the moderate point on the "strict construction" continuum.

2. Therefore, so long as Amendment 46 stands, direct payments from the Commonwealth to private institutions seem impermissible. The Amendment and the long-standing interpretations of it seem quite clearly to prevent lump-sum payments (New York's "Bundy money"), state funding or endowed chairs at private schools (New York's Schweitzer and Einstein professorships); and even payments for costs in excess of tuition that might supplement a program of scholarship awards to students.

3. Scholarships to students: If the Massachusetts student receives the scholarship, and can spend it wherever he likes, there seems to be no problem with Amendment 46. 9/ The current program of higher education scholarships seems constitutionally permissible. However federal First Amendment difficulties, discussed

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9/ Although doubts were expressed in 6 Opinions of the Attorney General of Massachusetts 648 (1922). The Massachusetts program, never challenged in court, is authorized by Ann. Laws of Massachusetts ch. 15 § 1D (1971 supp.).

infra, must be met. 10/

4. Commonwealth as conduit for the funds of others: By opinion, several attorneys general have approved Commonwealth administrative participation in programs that distribute federal funds to Massachusetts institutions 11/ (no attorney general or judge who would mind being lynched could oppose receipt of federal funds), and the Supreme Judicial Court has upheld the Commonwealth's Educational Facilities Authorization Act, under which bonds not pledging the Commonwealth's credit are sold for colleges at the lower rates made possible by the exclusion from federal income tax of interest on such bonds. 12/ Even so the Court coupled approval of this slight incursion with stern judicial language: 13/

> The Amendment's substantial purpose was to prevent direct assistance to private or sectarian charitable institutions and to preclude expenditure of public funds or appropriations for them.

10/ Also, State officials should be aware that the constitutionality on federal equal protection and right-to-travel grounds, of charging higher tuition at state colleges to out-of-state students is now pending before the U.S. Supreme Court. Vlandis v. Kline, 41 U.S.L.W. 2020 (U.S. Dist. Ct. D. Conn. 1972), probable jurisdiction noted, 41 U.S.L.W. 3312 (U.S. Sup. Ct. Dec. 4, 1972).

Conceivably a decision against such differential rates might someday be extended to bar award of scholarships to students attending school in Massachusetts but not to those attending elsewhere; or to award of scholarships to Massachusetts students at Massachusetts institutions but not to out-of-state students attending the same institutions.

11/ See Opinions of the Attorney General, September 20, 1943, p.74; Opinions of the Attorney General, March 26, 1951, p. 38.

12/ Opinion of the Justices, 354 Mass. 779, 236 N.E.2d 523 (1968).

13/ 354 Mass. at 784, 236 N.E.2d at 526

5. Massachusetts as contractor, purchasing services: Some such arrangements have certainly taken place. Some of them, although contracts between the Commonwealth and educational institutions, are saved by Section 3 of Amendment 46, authorizing public payment to private hospitals for medical care. 14/ Other small contracts, not saved in this way, have escaped judicial test. Conceivably over time repetition would make judges willing to approve. But the tenor of judicial pronouncement on this subject encourages no optimism on the part of the proponents of such schemes. Taking such a scheme to court now would definitely be risky. Resting a substantial public effort--for example, a program to contract with institutions on the basis of their commitment to produce graduates with stated skills, or a program to pay State funds for traineeships--on the hope of such a decision should be considered a last resort.

A treatise could be written on the tangled issue of standing: would anyone have standing to oppose such an arrangement? The relevant conclusion is that liberalizations of standing, particularly where challenges have been brought to state expenditures on the

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14/ Amendment 46:

> Section 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care

[Continued on Page 9]

grounds that they infringe specific bars against such expenditures, make it likely that someone would be legally authorized to sue, even in judicially neanderthal Massachusetts. 15/ Whether suit would in fact be brought is another question, but in the litigious U.S. (and in this litigious Commonwealth), this possibility provides a slender reed at best.

6. Cooperative arrangements between public and private institutions: Presumably much of the likely public assistance to such arrangements could be considered the payment of funds to the public school, which then combines its resources with its private neighbor. Examples: (1) buses between public and private campi could be run by the State, paid for by the State school, since they bring students to it and take its students elsewhere; (2) teachers at the private school could become part-time compensated members of the State institution's faculty, and could teach in the public school's building both full-time students from the public school and students from the private school who register for a course at the public school.

[Continued from Page 8]
or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

Note that the specificity or this section makes judicial approval of other contractual arrangements less likely. If purchase of medical care had to be specifically mentioned, a court might reason, then surely purchase of educational services is impermissible.

15/ See generally Flast v. Cohen, 392 U.S. 83 (1968).

Query: could that class be held at the private school, with the public school renting the classroom (the whole building?) for an hour (a day? a semester?)? This now begins to look terribly much like a subterfuge, and the battles over public aid to parochial elementary schools are making the courts expert at discovering and striking down subterfuges of this sort. But, in extremis, arrangements such as this might be considered.

7. Payments in lieu of taxes: There seems no constitutional reason why the Commonwealth could not make payments to cities and towns in compensation for public services rendered by the municipalities to private colleges, just as such payments have been made in many states on behalf of public institutions. These payments would be a reallocation of public revenues as between the state and its delegatee municipalities, and while the private institutions would benefit (through relief of pressure from localities for in-lieu-of-taxes payments), the form of the assistance seems compatible with Amendment 46.

All these speculations, interesting though they be to law teachers, may be irrelevant. On June 7, 1972, the Legislature, meeting as a Constitutional Convention, voted to approve H. 1881, an amendment that would have Section 2 of Amendment 46 read as follows:

> No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.

The vote for the amendment was 250-3. It needs approval from the Legislature again in 1973, and is expected to receive same. Then it would require approval by the voters in November 1974. Prospects are good, although grassroots attitudes to devices for permitting public expenditures are at best volatile.

If the amendment amends the Amendment, most specific Massachusetts constitutional problems with aid to private higher education will become academic. There would remain the question whether some aid arrangements were invalid because of "aiding any church, religious denomination or society." But this provision seems most sensibly analyzed in conjunction with the First Amendment issues to which Part II of this paper is devoted. That clause aside, the

amendment seems entirely clear and unambiguous in authorizing--or at least in asserting that Amendment 46 should no longer prohibit--direct grants to private higher educational institutions and direct grants to students or parents. Presumably the legitimacy of contractual arrangements of all sorts would flow inclusively from the specific authorization of more extreme devices.

III. The United States Constitution

The U.S. Constitution presents no general hurdle to state assistance for private activities serving public purposes. 16/ But the First Amendment does raise problems of tortuous complexity for state programs assisting religious institutions. Because many of the private colleges and universities that Massachusetts might seek to aid would be--in their present form and according to some definitions--sectarian, serious consideration of the present and likely future interpretations of the First Amendment seems warranted.

The text is, of course, glorious and unhelpful:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The significance of this provision for aid to private colleges can most usefully be analyzed according to the most recent "text," the decisions of the U.S. Supreme Court on June 28, 1971. On that day, in opinions that received less public attention than they might have because the Pentagon Papers crisis was also before the Court, Chief Justice Burger spoke for majorities that invalidated

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16/ See, e.g., Bradfield v. Roberts, 175 U.S. 291 (1899).

attempts by Pennsylvania and Rhode Island to assist private elementary and secondary schools; and that upheld federal support of private colleges through the Higher Education Facilities Act of 1963. 17/

In Lemon v. Kurtzman, 18/ the Court said that Pennsylvania could not constitutionally "purchase" secular educational services from parochial schools by paying those schools for teacher salaries and for textbooks; and said that Rhode Island could not supplement by 15% the salaries of teachers of secular subjects in nonpublic schools. Lemon, from which only Justice White dissented, broke new doctrinal ground by adding consideration of the extent of state "entanglement" with religion to the traditional concern with the purpose and the effect of the challenged statute. But, for present purposes, Lemon is important because it rejects the argument that because parochial schools perform a secular purpose as well as a religious purpose, the state can constitutionally assist the secular undertakings. The court said: 19/

17/ Title I, 20 U.S.C. §§ 711-721 (1964 ed. and Supp. V).

18/ 403 U.S. 602 (1971).

19/ 403 U.S. at 625.

> The merit and benefits of these schools, however, are not the issue before us on these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn.

In Tilton v. Richardson, 20/ on the other hand, the Supreme Court approved federal assistance to private colleges, including sectarian ones, in the form of grants for construction of facilities that must be used for secular purposes. Tilton v. Richardson is plainly the most important precedent for possible Massachusetts endeavors. About Tilton, it is important to note:

1. The statute was approved by only a 5-4 vote. Justices Black, Douglas, Brennan, and Marshall disagreed, although not entirely agreeing among themselves. Thus with two new Justices (Powell and Rehnquist have replaced Black and Harlan), and also because of the general impenetrability and lack of clear doctrine in this area of constitutional law, all readings of Tilton are hazardous, and all clear and certain statements about the meaning of the Constitution on this subject should be resisted.

20/ 403 U.S. 672 (1971).

2. The Chief Justice (and the three who agreed with his opinion: Harlan, Stewart, and Blackman) definitely said that aid to higher education must be appraised on a different constitutional basis from aid to elementary and secondary schools, and that at least some programs are satisfactory as to colleges which would not be satisfactory if enacted for elementary and secondary education. The reasons he gave for the distinction were not entirely convincing: college-age students are more resistant to religious teaching; college subjects are taught in ways somewhat limited by their academic disciplines; the tradition of academic freedom makes colleges places of less intellectual restraint than lower schools. The Chief Justice did not say why these differences of degree (which are not even true in every situation) require a constitutional distinction, but he certainly said that the distinction exists.

3. Even though Tilton upheld one statute aiding private colleges, the opinion is filled with language asserting the Court's view that the First Amendment does not permit just any such statute. Tilton itself struck down the provision of the Higher Education Facilities Act saying that aided facilities would become free of the rule against their religious use after twenty years. More important, Tilton emphasized several times specific facts about the Facilities Act that will not always be present: that the

program aids only buildings, and bricks are religiously more "neutral" than teachers; the program provides one-time grants, so there is no continuing relationship between the government and the church college (this is one thing the Court means by "entanglement"); finally, for the particular four colleges before the Court (Sacred Heart, Annhurst, Fairfield, and Albertus Magnus, all in Connecticut), "religious indoctrination is not a substantial purpose or activity." It is obvious, from the Chief Justice's opinion as well as from his slim plurality, that it is difficult to predict the present Court's response to cases that will arise in which some of these factors are not present.

4. Tilton says that some things may be done for at least some "sectarian" colleges. It does not cast light on the difficult question, which Justice Brennan in his Tilton concurrence wanted further data about, what constitutes a "sectarian" school. There is one important state case on that question, but it is murky. 21/

5. The Chief Justice's opinion in Tilton did not speak to the question whether institutions receiving funds under the Higher Education Facilities Act can constitutionally prefer co-religionists

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21/ Horace Mann League v. Board of Public Works, 242 Md. 645, 220 A.2d 51, cert. denied and appeal dismissed, 385 U S. 97 (1966).

as students or for teaching positions, or whether recipient schools can require their students to engage in religious services or practices. But five Justices--Black, Douglas, Brennan, White, and Marshall--said that recipient schools could not do these things. Thus, perhaps anomalously considering the Chief Justice's emphasis on preventing state "entanglement" with religious activities, the result of the case is that the schools can obtain the money but that they must accept certain limits on their religious practices as a consequence.

There seems to be no constitutional problem with any form of state assistance to non-sectarian institutions. Since Tilton does not cast light on what is sectarian, the Commonwealth might be on relatively strong ground if it provided a definition (for example, lay as well as religious members of the board, no discrimination according to religion in hiring or admission, no compulsory religious services), then administered a program according to that definition, and hazarded a federal court challenge.

But if policy or politics required a program aiding all private institutions, sectarian and non-sectarian, the sorts of aid that would be permitted would be constrained. After Tilton, one-time money to build a building would presumably be acceptable, so long as adequate safeguards were included against present or future

use of the building for religious activities. "General-purpose" aid would presumably be unconstitutional, since it would assist both secular and religious activities. In between, a host of problems would appear: perhaps aid specifically to pay teachers would be held bad, with a cite to Lemon v. Kurtzman, instead of good, citing Tilton v. Richardson; arrangements to contract for services might be questionable, since they would involve regular and continuing relationships, thus raising the specter of "entanglement". The Lemon and Tilton opinions contain language that will be quoted on both sides of all cases on these questions for decades. For Massachusetts, there seems to be no escape from adopting a program that appears wise, and appears in the judgment of the Governor and the General Court to be consistent with the First Amendment, and then permitting that program to be passed upon by the courts.

Finally, it is worth noting that Lemon v. Kurtzman has driven those seeking public assistance for parochial elementary and secondary schools to focus on a variety of "voucher" and tax-credit devices. Language from the Supreme Court seems to suggest that even though the religion is benefitted whether it gets money directly from the state or by state payment to the parent who hands it to the child who hands it to his teacher, the seemingly legalistic differentiation may indeed be the place where the

constitutional line is drawn. 22/ Walz v. Tax Commission, 23/ saying that churches can be given a tax exemption but not an appropriation, also suggests that this area is (perhaps unavoidably) filled with such razor-thin distinctions. If this is so, then every sort of public assistance to college students is probably constitutional, even if a religion or a religious institution derives as much benefit from the scholarship (or the tax credit for educational expenditures) as the student.

22/ Compare Board of Education v. Allen, 392 U.S. 236 (1966), wish Lemon v. Kurtzman, supra.

23/ 397 U.S. 664 (1970).